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In the Supreme Court of the United States

OCTOBER TERM, 1961

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WADE LAHAR CONSTRUCTION CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on April 13, 1961.

OPINIONS BELOW

The opinion of the District Court is reported at 179 F. Supp. 551. The opinion of the Court of Appeals (App. *infra*, pp. 23–44) is reported at 290 F. 2d 408.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1961. On July 6, 1961, the time for petitioning for a writ of certiorari was extended by order of Mr. Justice Whitaker to August 26, 1961. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent's employees have been engaged in reservoir clearance work performed in connection with a multi-purpose dam and reservoir project (the Table Rock Project on the White River in Missouri and Arkansas), authorized by Congress under its power to regulate commerce. The Table Rock Project was designed as part of a comprehensive plan for coordinated development of the water resources of the White River Basin for purposes of navigation, flood control, electric power, recreation and other beneficial uses. Respondent's work, like the other activities at Table Rock, was paid for out of project appropriations and supervised by the United States Army Corps of Engineers.

The Table Rock reservoir forms a lake extending into the States of Arkansas and Missouri, and respondent's clearance work extended into both States. A principal reason for the particular clearance plan adopted by the Army Engineers was to improve the navigability of the lake for the passage of boats—generally recreational craft.

The questions presented are:

1. In determining whether employees were engaged "in commerce" under the Fair Labor Standards Act, should the reservoir clearance be regarded as an integral element of the comprehensive interstate river project or as a separate local activity.

2. Whether, even if viewed as a discrete segment

of the project, the work of clearing land for the reservoir was employment "in commerce" by reason of the fact that one of its principal purposes was to improve the navigability of the interstate lake.

STATUTE INVOLVED

This case arises under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*, the pertinent provisions of which are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than $1 an hour;
>
> * * * * *
>
> SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

These proceedings were brought by the Secretary of Labor[1] under Sections 17 and 16(c) of the Fair Labor Standards Act, to enjoin respondent from violating the Act's minimum wage, overtime, and record-keeping requirements, and to recover unpaid minimum wages and unpaid overtime compensation due named employees. Respondent contracted with the Corps of Engineers to perform, at a total cost of more than $1,500,000, clearance work in the reservoir of the Table Rock Project. The employees in question were engaged in this work.

Construction of Table Rock Dam and Reservoir was authorized by the Flood Control Act of 1941 (55 Stat. 638, 645), on the basis of the detailed reports and recommendations appearing in House Document No. 917, 76th Congress, 3d Session, as part of a comprehensive plan previously approved for the development of the water resources of the White River Basin.[2] The White River, which has been the subject of navigational improvement projects by the Federal Government since 1892,[3] is considered navigable downstream from Branson, Missouri, whence it flows through Arkansas, and empties into the Mississippi River. There is no dispute that the purposes of the

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[1] Secretary Goldberg was substituted for former Secretary Mitchell by order of the Court of Appeals, dated April 3, 1961.

[2] The Table Rock Project was completed in 1959. The Norfork and Bull Shoals Projects had been completed in 1943 and 1952, respectively. The Beaver Project is currently under construction.

[3] House Document No. 917, *supra*, pp. 16, 37. This House Document is hereafter cited as HD.

Table Rock Project included improvement of interstate navigational potentialities, interstate flood control benefits and the development of hydroelectric power for interstate markets.[4] The Federal Power Commission endorsed the construction project upon the basis of studies which showed "that multiple-purpose reservoirs at the Table Rock and Bull Shoals sites, primarily for the control of floods, would have a substantial beneficial effect upon navigation" (HD, p. 4). It was contemplated that "[o]wing to the regulated and increased low flow in the river below the dams, navigation conditions would be improved in White River and to a lesser degree in the Mississippi River downstream from the mouth of White River" (HD, p. 48). In addition to the navigation, flood control, and power contributions to be made by the proposed project, it was anticipated that recreational and wildlife benefits would be provided by the dam's large reservoir which extends into both Arkansas and Missouri, covering portions of Carroll and Boone Counties in Arkansas, and Barry, Stone, and Taney Counties in Missouri (HD, pp. 15, 48).

Respondent, an Arkansas corporation, is one of the largest concerns engaged in reservoir clearance throughout the United States (its president, Mr. Lahar, having been engaged in clearing work under

[4] It was contemplated that the flood control benefits of the Table Rock Project and a companion project on the White River, the Bull Shoals Project, would accrue to Missouri, Mississippi, and Louisiana as well as Arkansas. The market for power from these two dams lay in Arkansas and Missouri. (HD, p. 49).

contracts with the Corps of Engineers for over 30 years, R. 56). Respondent has performed 56 clearance jobs since its incorporation in 1952 (R. 51–52). The two contracts here involved covered the entire clearing operation performed for the Table Rock Project, except at the dam site itself (R. 40–43, 46, 49), and provided for clearing in selected areas throughout the reservoir (in both Missouri and Arkansas). In some areas clearance included all timber growing out of the ground between elevation 915 and either elevation 874 or 840 (the clearing to the lower level in the public use areas). In other places modified clearing was effected by removing or topping only those trees that projected above the stated elevation. In still other areas, there was no clearing. Only one side of the stream was cleared at each location. In all, respondent's clearing operations covered 12,700 acres, including about 122 miles of shoreline in the reservoir (R. 42–46).

It was the Secretary's position that the Fair Labor Standards Act applied to "the project as a whole"—including the reservoir clearance—because of "the over-all purpose of the project" (R. 18). The government called as a witness the Corps of Engineers official under whose supervision the Table Rock reservoir clearing plan had been prepared—J. C. Pyle, Chief of the Hydraulic Branch of the Engineering Department, Little Rock District (R. 22). Mr. Pyle, on direct examination, explained that the clearing design was prepared as a part of "the overall project" and that the work was paid for out of appropriations provided by Congress for the general cost

of construction of the project; there was, he said, "no such thing as an allocation for recreation" (R. 22–23).

Mr. Pyle's testimony also made clear the extreme difficulty of attributing only a single purpose to a clearing operation which, it was hoped, might be beneficial in a number of ways to the comprehensive plan for the control and development of the White River. He described the purposes of reservoir clearance (R. 23):

> Clearing of the reservoir is desirable to the extent that it aids in control of the malaria and encephalitis vectors, reduces the hazard to boating, improves fish and wildlife conditions, adds to the general appearance and recreational value of the lake, and reduces the maintenance problems caused by floatage and possible interference with the outlet works.

Mr. Pyle acknowledged that the primary reasons for the clearing in question were "to promote the passage of boats" (R. 23) and "to control mosquitoes" (R. 35), but he also insisted that one of the objectives he had in mind in the preparation of the clearing design memorandum was the removal of "flotable material which would tend to damage the dam" (R. 29) and thereby interfere with its navigational, power, and flood control functions. He specifically denied that none of this clearance work would have been undertaken but for the recreational purposes, "because there are quite a few people in the Corps that feel that some clearing is needed" (R. 34–35).[5]

[5] On cross-examination, Mr. Pyle was questioned as to the following: changes in the "thinking" and "policy" of the Corps

Respondent's president, Wade Lahar, and its project engineer, Hilton Keen, testified that it was their opinion that the modified clearing performed at Table Rock was done solely for recreational purposes, health benefits, boating, and to improve local property values (R. 47–48, 58).

The trial court ruled that "the clearing performed by the defendant in the Table Rock Reservoir was not a necessary part of the over-all project and served no purpose in the protection or the operation of the dam," but was "strictly of a local nature," and therefore, "must be considered isolated local activity" outside the scope of the Fair Labor Standards Act (179 F. Supp. 551, at 560). The Court of Appeals affirmed this conclusion. It also rejected the government's alternative basis of coverage—that a specific

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of Engineers on the "concept of clearing reservoirs" (R. 26); the necessity or desirability of "any clearing from the standpoint of flood control, navigation or hydroelectric power" (R. 28); whether clearing in particular areas was designed with "the objectives * * * to take out floatable material that would tend to damage the dam" (R. 28–29); whether selection of other areas for clearance would not have been more effective if that had been an "objective in mind" (R. 29–31); how clearance at particular points might be expected to protect the penstock openings or spillway gates of the dam from floatage of debris (R. 32–35).

Mr. Pyle's testimony was that "there has been a general change in thinking all the way along, a gradual change"—that although "formerly they felt they would need to clear the whole lake", they now felt that it "is not necessary to clear nearly that much" (R. 26, 35). He further stated that there was a difference of opinion among the different offices of the Corps of Engineers as to the adequacy of the small clearing plan from the flood-control, power standpoint (R. 27), and reaffirmed his view that the clearance plan actually adopted was designed "for a number of purposes" including consideration of "the need of preventing drift to collect at the dam" (R. 28, 29).

purpose of the clearance work was to improve the navigability of the interstate reservoir—regarding this as "only an incidental circumstance" insufficient to bring the clearance within the scope of the statutory phrase, "engaged in commerce" (App. *infra*, pp. 42–43; 179 F. Supp. at 561).

REASONS FOR GRANTING THE WRIT

Review of the decision below is warranted on two grounds.

First, the Eighth Circuit has adopted an approach which fragmentizes work performed on integrated projects in interstate commerce—one which, if consistently followed, would remove large numbers of employees from the coverage of the Fair Labor Standards Act. Four other circuits have reached a contrary conclusion on essentially similar facts by viewing such projects as a whole. The latter cases, we believe, are in keeping with prior decisions of this Court and serve to carry out the purposes of the Act in a practical and predictable manner.

Secondly, the court below erred in rejecting the alternative basis of coverage. Even if the reservoir clearance work in question is viewed apart from the project to which it is related, it improves navigation on an interstate lake. In this aspect, the instant case conflicts with the numerous decisions of this and other courts holding that improvement of an interstate highway or waterway is engagement "*in* commerce."

I

As both courts below recognized, the Table Rock Dam and Reservoir Project—which is the sole basis

and justification for undertaking the reservoir clearance work here involved at federal expense and under the supervision of the Army Corps of Engineers—was authorized by Congress and designed as part of a comprehensive national plan for development of the White River Basin in Missouri and Arkansas. The project had multiple purposes—aid to navigation on the lower White and Mississippi Rivers, flood control, power, and other beneficial uses. It is also clear that the reservoir, as well as the dam, serves "commerce" functions; in particular it aids interstate navigation and flood control. Under this Court's precedents, plainly construction work for the improvement of interstate transportation facilities (including rivers and waterways) is "in commerce" for purposes of the Fair Labor Standards Act. See *Mitchell* v. *Vollmer*, 349 U.S. 427, and cases there cited.

Respondent's employees were engaged in one aspect of the comprehensive Table Rock project—the clearing of the reservoir. Only on the basis of a piecemeal approach, isolating a particular type of work within the reservoir and appraising separately the need, wisdom, and effect of this single aspect of the integrated project, could the court below decide that respondent's employees were not also engaged "in commerce". The government believes that certiorari should be granted because this approach to work on a federally authorized project in interstate commerce is inconsistent with the decisions of this Court; is at variance with results reached by four other courts of appeals; threatens to impose upon private parties and the

courts an unmanageable burden—that of evaluating engineering, economic, and other data to determine how necessary or desirable is each aspect of a comprehensive project; and potentially affects large numbers of employees who work on such projects.

1. The court below has failed to give effect to the distinction between the "in commerce" and the "related to the production" of goods for commerce provisions of the Fair Labor Standards Act which this Court repeated as recently as *Mitchell* v. *Zachry Co.*, 362 U.S. 310.[6] As there stated, the "in commerce" coverage of the Act has been construed "by the courts in conformity with the statutory scheme, so as to displace state regulation 'throughout the farthest reaches of the channels of interstate commerce.'" *Mitchell* v. *Zachry Co.*, 362 U.S. at 320, quoting from *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; see, also, *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128.

[6] The *Zachry* opinion expressly noted, at the outset, that the dam there was "not a multi-purpose project" (362 U.S. at 310), and emphasized that the issue before the Court concerned only the "related-to-production" clause of Section 3(j) dealing with the "periphery of coverage" of "activities only 'related' to production" (*id.* at 316-317); it carefully distinguished decisions involving the "in commerce" phase of coverage (*id.* at 320). And, contrary to the assumption by the court below that the 1949 Amendments evidenced a general "legislative tendency * * * in the direction of limiting the broad interpretations which the courts have given the statute" (App. *infra*, p. 42), any such inference with respect to the judicial interpretation of the "in commerce" aspect was directly contradicted by *Zachry* (see text, *supra*). In contrast to the Eighth Circuit in the instant case, the Fifth and Sixth Circuit Courts of Appeals have refused to draw that inference from *Zachry*. *Mitchell* v. *Hooper Equipment Co.*, 279 F. 2d 893 (C.A. 5); *Goldberg* v. *Owen* (C.A. 6) 15 WH Cases 139 (decided June 30, 1961, not yet officially reported).

Contrary to the "implications" found by the court below (App., *infra*, p. 38), this Court, in *Zachry*, expressly recognized that Congress, by the 1949 Amendments, "did not alter" or in any way limit the prior broad judicial construction of the Act's "in commerce" coverage (362 U.S. at 316–317).[7] That coverage must still be "construed liberally to apply to the furthest reaches consistent with congressional direction" (*Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U.S. 207, 211; *Mitchell* v. *Vollmer*, 349 U.S. at 429).

In this light, it is plain that the clearing operation undertaken by respondent's employees was well within "the furthest reaches consistent with congressional direction," whether this standard be regarded from the point of view of substantiality of the connection of the operation with interstate commerce or from the standpoint of respect for state control of essentially local enterprise. The clearing operation was an integral part of a single construction project which was indisputably "in commerce". The work in question took place at the very site of the construction of an interstate facility, was regarded by Congress as an integral part of that construction, and was paid for out of appropriations for the general cost of construction of the one project. The precise plans were drawn and the operation was supervised by the Army Corps

[7] Indeed, the 1949 Amendments, far from imposing any restrictions on the "in commerce" coverage, made one change; that modification *broadened* coverage so as to include commerce "*between* any State and any place outside thereof", replacing the previous language "from any State to any place outside thereof" (emphasis added).

of Engineers as part of the Table Rock Dam construction project.

The decision below is, indeed, at odds with principles expressed in the very cases upon which the court below relied, *i.e.*, *Zachry, supra,* and *10 East 40th St.* v. *Callus,* 325 U.S. 578. Clearing the reservoir of a federal multi-purpose river project, at federal expense and under federal supervision, on property owned and to be operated by the United States for national purposes certainly does not "spontaneously satisf[y] the common understanding of what is local business"; nor does it otherwise fit the description of "local business" or "essentially local activities that Congress did not see fit to take over by legislation" (see *Callus,* 325 U.S. at 582–583; *Zachry,* 362 U.S. at 314). Regulation of the work involved in this case, far from being representative of "historic functions of the individual States" (see *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, 520), is peculiarly a matter "of traditionally national concern" (see *Zachry,* 362 U.S. at 316). There is thus no possible warrant for excluding the activity from the broad remedial purposes of the Act in order to accommodate "the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character" (*ibid.*).

2. In considering the status of employees working on some single aspect of an integrated project in interstate commerce, four other courts of appeals have taken the position that, in determining this Act's coverage of employment on projects of this type (including river, highway, airfield, radio communication and

other comparable projects), "the whole project * * * should be regarded as an entirety, and not broken down into its component parts." *Goldberg* v. *Nolla, Galib & Cia.* and *Goldberg* v. *Five Boro* (C.A. 1), decided June 15, 1961 (not yet officially reported), 15 WH Cases 145, 147 (construction of technical buildings and supporting facilities for one of the Army Signal Corps' radio relay centers); *Bennett* v. *Loftis Co.*, 167 F. 2d 286, 288 (C.A. 4); *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663, 668–669 (C.A. 5), certiorari denied, 355 U.S. 825; *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915. As stated by the Fourth Circuit over a decade ago (in upholding the Act's coverage of a watchman guarding the construction of a new highway bridge): "If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act" (*Bennett* v. *Loftis Co.*, 167 F. 2d at 288). In approach and in principle, these cases conflict with the decision below.

3. The piecemeal approach will involve the courts, we believe, in an effort to evaluate factors which they are ill equipped to determine—matters which involve essentially legislative or executive judgments. There are frequent controversies, both in Congress and within the executive establishment, as to how extensive a project should be undertaken and as to the manner of its execution. Should a navigation project be narrowly confined or should it be broadly conceived to serve incidental purposes, such as (for example)

the production of power and the advancement of recreational opportunities? Should a project be executed in Spartan fashion, in the interest of rigid economy, or should it be carried out in a manner which will satisfy other values, including, perhaps, aesthetic sensibilities? Is a particular aspect of a project a worthwhile addition or a needless frill? In planning an interstate highway, should efforts be made to landscape the borders of the road as well as provide a means of surface transportation? If a reservoir is needed as an adjunct of a dam, should steps be taken, at the same time, to make it a highly useful and attractive reservoir—a haven for wildlife, a place of recreation, an area free of insect infestation? Questions of this kind involve, among other things, considerations of cost and of political expediency. Also, they involve innumerable subsidiary problems as to which expert planners, engineers and technicians will often differ. We submit that the courts should not be called upon to review the myriad judgments involved in the planning and execution of a comprehensive project. If the reviewing court is satisfied that the overall project is "in commerce", it should suffice that the particular work which gives rise to the question of coverage is a part of the project or ancillary to it.

The evidence in the present record of differences in engineering opinion as to the need and extent of clearance for purposes of protecting the dam (R. 34–36), of the "several plans" considered by the engineers before selection of the one adopted for "a multiple reason" (pp. 26–29), and of the "change in engineering attitudes in the intervening years * * *

as to the non-necessity of clearance in projects of this kind" (see App. *infra*, p. 43), reflects precisely the "complexity of engineering data", the "contrariety of views" and the "questions of policy" which, as this Court has emphasized in other contexts, are not generally within the competence of courts to assay.[8]

It is suggestive to compare the instant case with *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334 (C.A. 10), a case which also involved reservoir clearance and can be distinguished only if each reviewing court is to pass judgment on a complexity of engineering data and policy considerations as to the need, effectiveness, and desirability of each particular segment of a multi-purpose river project.[9] In *Pennington-Winter*, after concluding that construction of the multi-purpose dam (on a non-navigable tributary of the Arkansas River) was within the coverage of the Act because "[t]he construction of levees, dams and other improvements * * * for the purpose of aiding navigation and preventing floods, must be considered as items of a single project undertaken to effectuate such purposes" (198 F. 2d at 337), the court of appeals held that the reservoir clearance work for the project was also covered, reversing the

[8] See, *e.g.*, *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224; *United States v. Commodore Park*, 324 U.S. 386; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 522, 527–528; *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426. Cf. *Berman* v. *Parker*, 348 U.S. 26, 33–36.

[9] The Government did not oppose certiorari in *Pennington-Winter* because it involved "an important question as to the application of the Act which has not specifically been determined by this Court * * *" (see Memorandum for the Respondent, pp. 8–9, No. 380, Oct. Term, 1952).

trial court's ruling that the clearance work was not covered because primarily related to recreational activities. The differing results in these two closely similar cases emphasize the need for review by this Court.

4. The question presented by this case is of substantial importance not only with respect to multi-purpose river development projects, but in the entire area of federal projects for the development or improvement of interstate facilities.

The impact of the decision below on river projects alone is considerable. The Corps of Engineers has, since March 1953 (the date of denial of certiorari in *Pennington-Winter*), undertaken 130 federally financed multi-purpose river projects, all of which, we are informed, have included substantial reservoir clearance. Thirty-five such projects are currently under construction, and the estimated reservoir clearance costs total over $31,000,000.[10] In addition,

[10] This information was furnished to the Department of Labor by the U.S. Army Corps of Engineers, Civil Works, compiled from the 1959 Annual Report, House Document No. 244, and supplementary current information. The projects are in various stages of construction so that the estimated costs range from those fairly firm to those preliminary and subject to change. A list of projects in the planning and construction stage, with their purposes, is found in S. Rept. No. 1768, 86th Cong., 2d Sess., p. 7, *et seq.*

While estimates of the number of employees involved are not available, some indication of the substantial number involved appears from the fact that the work in the instant case required 119 employees, working considerable overtime (R. 56), under contracts totalling 1½ million dollars; and in the *Pennington-Winter* case (*supra*, p. 16), about 100 employees (also working substantial overtime) were employed under a contract for $698,360.

numerous multi-purpose dam and reservoir projects are being carried out under the jurisdiction of the Bureau of Reclamation and the Agriculture Soil Conservation Service.[11]

As to other types of federal projects which may be affected, it suffices to point to the extensive federal highway construction program, which makes provision for roadside and landscape development, *i.e.*, beautification, scenic overlooks, recreational and rest areas, etc.[12] The coverage of all this work is affected by the decision below.

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[11] Information from the Bureau of Reclamation (U.S. Department of the Interior) indicates that over 75% of the 54 federally-financed dam and reservoir projects constructed under the jurisdiction of the Bureau since March 1953 have included reservoir clearance, and at least 14 such projects are currently under construction.

Information from the Director of the Water-Shed Planning Division, Soil Conservation Service (U.S. Department of Agriculture), indicates that clearing was required in each reservoir of 304 multi-purpose water-shed projects (averaging seven reservoirs per project) completed or under construction since 1954 with federal grants furnished by the Soil Conservation Service, as authorized by the Watershed Protection and Flood Prevention Act of 1954.

[12] In the federal-aid highway system, provision is specifically made for "roadside and landscape development," including the purchase of adjacent strips of land "for the preservation of the natural beauty through which highways are constructed" (23 U.S.C. 319). The Office of Engineering in the Bureau of Public Roads (U.S. Department of Commerce) advises that during 1960 between 5,000 and 7,500 estimated man-years of highway construction labor were used in roadside improvements outside the paved area, including beautification work, erosion control, planting, setting up recreational and rest areas, etc.

II

Even if the reservoir clearance could be isolated from the other aspects of the project, the court below departed from the controlling decisions of this Court when it rejected the alternative basis of coverage advanced by the Secretary: That the activity was "in commerce" because a principal purpose and an undoubted consequence of the work was to improve the navigability of an interstate lake.

The Court of Appeals did not question—quite the contrary, it found—that the reservoir clearance was calculated to improve the navigability of the lake formed by the dam and reservoir. The court also took note of the fact that the waters diverted to the lake would cover portions of two states, Missouri and Arkansas. It resisted the suggestion (which it described as "tantalizing") that these circumstances brought the case within the "in commerce" language of the statute, apparently because it believed that some distinction ought to be drawn as between navigation (or transportation) for non-commercial (recreational) and commercial (trade) purposes. But the Act makes no such distinction. It defines commerce (*supra*, p. 3) to include "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." This Court, moreover, has laid the question to rest. It has stated that "commerce", as defined in the Act, includes "transportation as such, and not merely * * * shipments or transportation of

articles that are intended for sale, exchange or other trading activities." *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 512.[13]

If, as we believe, it is immaterial that the interstate lake will be used by recreational rather than commercial craft, there can be no doubt that the Act applies. Certainly, work on an interstate highway, whether it be an overland road or a waterway, is directly covered. See, *e.g.*, *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *Mitchell* v. *Vollmer*, 349 U.S. 427.

We point out additionally that numerous decisions of the courts of appeals have held that the Act reaches activities related to the improvement of transportation facilities, even though those facilities are used primarily for non-commercial reasons or for intrastate (as opposed to interstate) purposes. E.g., *North Shore Corp.* v. *Barnett*, 143 F. 2d 172, 174 (C.A. 5)—a privately owned and operated toll road and bridge located wholly within one county of Florida and serving primarily local traffic to and from an island off the coast, but also "open and available at all times for interstate use" (mostly by tourists), held to be an instrumentality of interstate commerce "based upon the fact of interstate use rather than upon the extent of such use"; *Crook* v. *Bryant*, 265 F. 2d 541, 543 (C.A.

[13] Cf. *Arizona* v. *California*, 283 U.S. 423 at 454, fn. 5, noting that a part of the Colorado River which the Boulder Dam project would make "susceptible to use by power boats" was a boundary stream, so that "such navigation will be at least partially interstate"; *Davis* v. *United States*, 185 F. 2d 938 (C.A. 9), certiorari denied, 340 U.S. 932, holding that Lake Tahoe, located in California and Nevada, is a navigable waterway of the United States although it is used primarily by sightseeing boats.

4)—"a limited access toll road * * * used by vehicles traveling interstate, not by necessity but for convenience only"; *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773, 775 (C.A. 5)—a pleasure yacht held to be "clearly an instrumentality of commerce * * * even though such transportation was not in connection with a trade or business." [14]

[14] See, also, *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C.A. 8)—telephone service for subscriber-members of an association of farmers which was devoted primarily to local calls (only a fraction of 1% of its revenue being derived from the infrequent interstate calls) held interstate commerce because "continuous [interstate] service" was "offered"; *Emulsified Asphalt Products Co.* v. *Mitchell*, 222 F. 2d 913, 914 (C.A. 6)—city, town and country streets and roads, constructed primarily for local traffic, held to be interstate instrumentalities because "used by persons and goods passing between the various States"; *Compania de Ingenieros y Contratistas, Inc.* v. *Goldberg* and *Quilichini* v. *Goldberg*, 289 F. 2d 78, 80 (C.A. 1)—construction of sections of secondary roads in rural areas of Puerto Rico held covered because "at least some agricultural products * * * from areas alongside and near the roads" would be transported interstate "over other roads which connect or would connect with the roads here involved"; *Austford* v. *Goldberg* (C.A. 8) (decided June 29, 1961, not yet officially reported), 15 WH Cases 135—maintenance of county and township dirt and gravel roads, wholly within one rural county of North Dakota, held covered because some agricultural products were transported over them to connecting roads and ultimately shipped interstate.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
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Department of Labor.
AUGUST 1961.

APPENDIX

In the United States Court of Appeals for the Eighth Circuit

Nos. 16509 and 16510

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

WADE LAHAR CONSTRUCTION COMPANY, A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

(April 13, 1961)

Before VAN OOSTERHOUT and BLACKMUN, Circuit Judges, and REGISTER, District Judge

BLACKMUN, *Circuit Judge:* These are companion cases instituted by the Secretary of Labor under § 17 and § 16(c), respectively, of the Fair Labor Standards Act of 1938, Chapter 676, 52 Stat. 1060, as amended, now found as 29 USCA § 201 et seq.[1] The complaint in the first action alleges violations by the defendant of the Act's minimum wage, maximum hours, and record keeping provisions and demands injunctive relief. The second action seeks compensation for 29 named employees of the defendant. The District Court held that the employees were engaged neither

[1] Subsequent references herein to the Act are to sections as amended and as numbered in USCA.

"in commerce" nor "in the production of goods for commerce" within the meaning of the Act. As a consequence, it dismissed both complaints. 179 F. Supp. 551. The Secretary has appealed.

The pertinent facts are set forth with meticulous detail in Judge Miller's opinion below. They need not be repeated at length here. We stress the following:

1. The defendant is a general contractor which has participated in reservoir clearing projects and other similar work throughout the country. Its president has been active in endeavors of this kind for the government since 1931.

2. Of the 29 employees here involved, only 3 are concerned with both the wage and overtime provisions of the statute. The remaining 26 are concerned only with overtime. It is conceded that the Act's overtime requirements were not met.

3. The project is the Table Rock Dam and Reservoir on the White River. This stream rises in the mountains of northwest Arkansas, flows northeasterly 215 miles into Missouri, and then flows southeasterly back into Arkansas for a distance of 505 miles where it empties into the Mississippi upstream from Arkansas City. Table Rock Dam itself was completed in 1959[2] and is situated in Taney County, Missouri, near the town of Branson. The reservoir it creates extends its arms into Barry and Stone Counties, Missouri, and into Boone and Carroll Counties, Arkansas.

4. The basic authority for the construction of the Table Rock project is found in House Document No. 917, 76th Congress 3rd Session. This consists of reports and recommendations transmitted in 1940 to the

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[2] This does not render the injunction case moot. *Chambers Construction Company* v. *Mitchell*, 8 Cir., 233 F. 2d 717, 725. See *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43.

House Committee on Flood Control. The projects recommended therein came to be authorized by the Flood Control Act of 1941, 55 Stat. 638, 645, which referred to "the prosecution of the comprehensive plan approved in the Act of June 28, 1938, for the White River Basin in Missouri and Arkansas, including the projects for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 917 * * *". The plan admittedly had as its primary purposes aid to navigation on the lower White and Mississippi Rivers, flood control, generation of electric power, and recreation.

5. The Table Rock project is the third in a series of dams built on the White and its tributaries. The first was the Norfork Dam and Reservoir in Arkansas completed in 1943. The second was the Bull Shoals Dam and Reservoir, also in Arkansas, completed in 1952. Both of these are downstream from Table Rock. The fourth is to be upstream near Beaver, Arkansas. The entire development of the White River Basin is under the supervision of the Army Corps of Engineers.

6. The defendant obtained, as a result of bids, two contracts for clearance on the Table Rock project. The work proposal submitted by the Corps listed wage scales to be paid and mentioned the Eight-Hour Law, 27 Stat. 340, as amended, now found as 40 USCA § 321 et seq., and two other statutes. It made no reference to the Fair Labor Standards Act.

7. The defendant's clearance work involved certain areas of the reservoir in both Arkansas and Missouri but specifically did *not* involve the damsite itself. The clearing for the dam's immediate area was performed by another contractor.

8. The cost of the defendant's work was paid by the government out of appropriations for the overall project.

9. The reservoir has a series of "pools" located between elevations or contours. The normal level of the water in the reservoir is at Elevation 915 and the "power pool" consists of the area between that elevation and the lower Elevation 846. The area between Elevation 915 and 936 (or thereabouts) is the "flood pool" which will contain water only during periods of flood. The entire reservoir up to 936 contains approximately 52,000 acres. 10,000 of these lie above 915.

10. Complete clearing of all timber was accomplished in certain areas from Elevation 915 down to either 874 or 840 (the clearing to the lower of these was in the public use areas). In certain other areas only modified clearing was effected down to 874 or 840. This consisted of clearing, by removal or topping, of only those trees which projected above the stated elevation but most of the trees where this type of clearing was performed were left standing. Trash and brush were allowed to remain there. The practice was to clear only one side of the stream and to leave the opposite side totally uncleared. In still other areas, no clearing of any kind was effected even though these locations were between the same contour lines as the areas for clearance or modified clearance. In the flood pool itself there was no clearing. The defendant's work, on both complete and modified clearance, covered 12,700 acres and 122 miles of a total of 857 miles of "shoreline".

The Secretary's position on appeal is that the clearing work, being on a multiple purpose project constructed with federal funds as a part of the comprehensive development program of the White River Basin for the combined purposes of navigation improvement, flood control, power, and other beneficial uses, "is in practical effect so integral a part of the

improvement of an interstate instrumentality as to be 'in commerce' within the coverage" of the Act. He cites as controlling the 1952 case of *Tobin* v. *Pennington-Winter Const. Co.*, 10 Cir., 198 F. 2d 334 (cert. den. sub nom. *Pennington-Winter Construction Co.* v. *Durkin*, 345 U.S. 915). He also refers to the established propositions that the determination of need for a particular government project is a matter of legislative judgment and is not for the courts and that the Congress under the commerce clause may constitutionally reach the lesser aspects of a single primary project. He urges that the same "practical realistic approach" is applicable to coverage under the Act. He argues secondarily that the employees here were engaged in improving the navigability of a waterway between two states and that for this reason they are covered.

The defendant's position is that the facts of each case must control its disposition; that the recent case of *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, not mentioned in the Secretary's brief, is significant; that the general propositions urged by the Secretary have no application here; that *Pennington-Winter* is not relevant; that the record is silent as to the use of the reservoir for commerce; and that such use in any event is purely local.

The statute, § 206(a) establishes the minimum wage:

> Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—* * *

207(a) is concerned with maximum hours:

> Except as otherwise provided in this section, no employer shall employ any of his em-

> ployees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 211(c) requires appropriate records. Violation of these provisions is made unlawful by § 215(a)(2) and (5). § 217 and § 216(c) authorize actions, such as these, by the Secretary.

The terms "in commerce" and "in the production of goods for commerce" appear not only in § 206(a) and § 207(a) but, as well, in § 202(a) setting forth the findings of Congress, and in § 208(a). They are, of course, vital in the interpretation and application of the Act. Some of the words in these phrases are in turn defined in § 203.[3]

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[3] "§ 203. Definitions * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

"(i) 'Goods' means goods * * * wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

Subsection (j) assumed its present form by amendment in 1949. Prior thereto its last clause read "or in any process or

The Supreme Court authority. Those sections of the Act which are involved here have been the subject of extensive litigation. Since February 3, 1941, when a united court held the Act to be within the commerce power of Congress and not violative of the Fifth and Tenth Amendments, *United States* v. *Darby*, 312 U.S. 100; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, these sections have been subjected to scrutiny and interpretation in over 30 cases in the Supreme Court itself.[4]

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occupation necessary to the production thereof, in any State." The amendment thus inserted "closely related" before "process" and substituted "directly essential" for the word "necessary."

[4] *Kirschbaum Co.* v. *Walling*, 1942, 316 U.S. 517; *Overnight Motor Co.* v. *Missel*, 1942, 316 U.S. 572; *Warren-Bradshaw Co.* v. *Hall*, 1942, 317 U.S. 88; *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U.S. 564; *Higgins* v. *Carr Bros. Co.*, 1943, 317 U.S. 572; *Overstreet* v. *North Shore Corp.*, 1943, 318 U.S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 1943, 318 U.S. 740; reversing per curiam 288 N.Y. 687, 43 N.E. 2d 83; *McLeod* v. *Threlkeld*, 1943, 319 U.S. 491; *Walton* v. *Southern Package Corp.*, 1944, 320 U.S. 540; *Tennessee Coal Co.* v. *Muscoda Local*, 1944, 321 U.S. 590; *Addison* v. *Holly Hill Co.*, 1944, 322 U.S. 607; *Armour & Co.* v. *Wantock*, 1944, 323 U.S. 126; *Skidmore* v. *Swift & Co.*, 1944, 323 U.S. 134; *Phillips Co.* v. *Walling*, 1945, 324 U.S. 490; *10 East 40th St. Co.* v. *Callus*, 1945, 325 U.S. 578; *Borden Co.* v. *Borella*, 1945, 325 U.S. 679; *Roland Co.* v. *Walling*, 1946, 326 U.S. 657; *Martino* v. *Mich. Window Cleaning Co.*, 1946, 327 U.S. 173; *Mabee* v. *White Plains Pub. Co.*, 1946, 327 U.S. 178; *Boutell* v. *Walling*, 1946, 327 U.S. 463; *Schulte Co.* v. *Gangi*, 1946, 328 U.S. 108; *Walling* v. *Portland Terminal Co.*, 1947, 330 U.S. 148; *Murphey* v. *Reed*, 1948, 335 U.S. 865; *Farmers Irrigation Co.* v. *McComb*, 1949, 337 U.S. 755; *Powell* v. *U.S. Cartridge Co.*, 1950, 339 U.S. 497; *Alstate Construction Co.* v. *Durkin*, 1953, 345 U.S. 13; *Thomas* v. *Hempt Bros.*, 1953, 345 U.S. 19; *Mitchell* v. *Joyce Agency, Inc.*, 1955, 348 U.S. 945; *Mitchell* v. *Vollmer & Co.*, 1955, 349 U.S. 427; *Mitchell* v. *Lublin, McGaughy & Asso.*, 1959, 358 U.S. 207; *Mitchell* v. *H. B. Zachry Co.*, 1960, 362 U.S. 310. There are additional cases which, while they involve other sections of the

While some of these decisions by our highest court have been unanimous, most of them have not and in several instances the particular case or the entire decisional process in this statutory area has been characterized as presenting "a difficult problem" (Lublin, p. 212), as "rewarding as an attempt to square the circle" (Kirschbaum, p. 520), as requiring "painstaking appraisal of all the variant elements" and as involving "matters of the nicest degree" (Zachry, pp. 315 and 321).

The Court has often intimated that much of the difficulty may be due to the absence of aid afforded by a preliminary administrative process and the consequent placing upon the courts of "the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations"; to the fact that the Act, in contrast to certain other important federal regulatory legislation, stops short of limits which might constitutionally have been reached (Kirschbaum, p. 523; 10 East 40th St., pp. 579–80); and to the lack of certain statutory definitions (Bay Ridge, p. 460; Zachry, p. 320). The result is that the courts find themselves

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Act, are revealing and helpful for the solution of our present problem: *Anderson* v. *Mt. Clemens Pottery Co.*, 1946, 328 U.S. 680; *Bay Ridge Co.* v. *Aaron*, 1948, 334 U.S. 446; *Maneja* v. *Waialua Agricultural Co.*, 1955, 349 U.S. 254; *Steiner* v. *Mitchell*, 1956, 350 U.S. 247; *Mitchell* v. *King Packing Co.*, 1956, 350 U.S. 260; *Mitchell* v. *Budd*, 1956, 350 U.S. 473; *Mitchell* v. *Kentucky Finance Co.*, 1959, 359 U.S. 290; *Arnold* v. *Ben Kanowsky, Inc.*, 1960, 361 U.S. 388.

These cases are gathered in this footnote in the hope that their citation here will simplify the reading of this opinion. They will usually be referred to later by their respective primary names. We cite them all, moreover, to show the warmth of the issues which have been generated under the Act, the obvious complexity of the problems and, as brought out below, the closeness of the lines that have been drawn.

involved "in the empiric process of drawing lines from case to case, and inevitably nice lines" (10 East 40th St., p. 579), and in dealing "with doubtful instances" (Threlkeld, p. 495).

With this difficulty announced and recognized, the Court, in applying the Act, nevertheless has "tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction" (Kirschbaum, p. 523). Against this background the following matters of note and emphasis emerge:

1. As already indicated, Congress, in producing the Act, did not make it coextensive with the limits of its power over commerce. "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied" (Kirschbaum, p. 522; Overstreet, p. 128).

2. This necessarily means that there is a remaining area which is the subject for appropriate state regulation. Congress "indicated its purpose to leave local business to the protection of the states" (Jacksonville Paper, p. 570; 10 East 40th St., p. 582; Waialua, p. 272; Zachry, p. 314).

3. This less-than-complete coverage is manifested and occasioned by the Act's failure to contain, with respect to interstate commerce, such words as "affecting" or "promoting" rather than the narrow "engaged in commerce or in the production of goods for commerce" (*Polish Alliance* v. *Labor Board*, 322 U.S. 643, 647; Carr, p. 574; Threlkeld, p. 493; Lublin, p. 211).

4. This fact of restricted coverage, however, "is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (Overstreet, p. 128; Lublin, p. 211). Indeed, it is to be construed liberally, recognizing "that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (Jacksonville Paper, p. 567; Overstreet, p. 128; Zachry, p. 320) limited only by the reach of the Act itself (Threlkeld, p. 493). See also *Mitchell* v. *Kroger Company*, 8 Cir., 248 F. 2d 935, 938. We are said to be dealing with an Act "that has been given a liberal construction from *Kirschbaum* * * * to *Alstate* * * *" (Vollmer, p. 429).[5] The statute "must not be interpreted or applied in a narrow, grudging manner" (Tennessee Coal, p. 597).

5. On the other hand courts are to bear in mind that "it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." (Holly Hill, p. 617); they are to be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation" (10 East 40th St., pp. 482–3; Zachry, p. 314).

6. The provisions of the Act "are remedial and humanitarian in purpose" (Tennessee Coal, p. 597) and the statute "was based on findings and a declaration of broad policy" (Holly Hill, p. 616).

7. It is said that "decisions dealing with various assertions of state or federal power in the commerce field are not particularly helpful in determining the reach of this Act" (Jacksonville Paper, p. 569;

[5] The liberal construction given the Act from *Kirschbaum* * * * to *Alstate* * * * and down to and including the *Vollmer* case is now forsaken." Mr. Justice Douglas dissenting, with others, in Zachry, p. 322.

Kirschbaum, pp. 520–1) and that there is "no single concept of interstate commerce which can be applied to every federal statute regulating commerce" (Threlkeld, p. 495).

8. Nevertheless, the observation made, in *Swift and Company* v. *United States,* 196 U.S. 375, 398, with respect to the constitutional scope of the commerce power, that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" has been applied "as a starting point for inquiry whether a particular business is 'in commerce' within the meaning of this Act" (Jacksonville Paper, p. 570).

9. The application of the Act is "dependent upon the character of the employees' activities" and not upon those of the employer (Kirschbaum, p. 524; Warren-Bradshaw, p. 90; Jacksonville Paper, p. 571; Overstreet, p. 132; Threlkeld, p. 497; Lublin, p. 211; Zachry, p. 315). The fact an employer may be engaged in commerce or in the production of goods for commerce does not mean that all his employees are necessarily covered by the Act (White Plains, p. 184).

10. Tests have been evolved. In cases where the "in commerce" phrase is in issue the test "is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it" (Threlkeld, p. 497; Boutell, p. 466) or "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity" (Vollmer, p. 429; Lublin, p. 212; *Mitchell* v. *Brown,* 8 Cir., 224 F.2d 359, 363, cert. den., 350 U.S. 875). Where the "production of goods for commerce" phrase is involved the test, at

least before the 1949 amendment, was whether the work has "a close and immediate tie with the process of production for commerce" (Kirschbaum, p. 525; Borden, p. 682; Roland, p. 665; Farmers Irrigation, p. 759; Waialua, p. 271). "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined" (Kirschbaum, p. 526). Since 1949 it is still required "that we once again apply the formulation set down in *Kirschbaum,* which, in view of the 1949 amendment, we must do with renewed awareness of the purpose of Congress to avoid intrusion into withdrawn local activities" (Zachry, p. 318).

11. The "test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce" (Armour, p. 131; *Tobin* v. *Johnson,* 8 Cir., 198 F. 2d 130, 132, cert. den. sub nom. *Johnson* v. *Durkin,* 345 U.S. 915; *Hertz Drivurself Stations* v. *United States,* 8 Cir., 150 F. 2d 923, 926).

12. No precise formula or hard and fast rule which will resolve all cases is available. "Formulas are not provided by the great concepts of the Constitution * * *" (Kirschbaum, p. 526) and none is provided here. "Practical considerations" are repeatedly emphasized (Overstreet, p. 128; Vollmer, p. 429). "What is required is a practical judgment * * *" (Armour, p. 130; Roland, p. 665). As has been noted above, it is a matter of drawing lines:

> And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse

> for being narrow if they are drawn on rational considerations. *10 East 40th St. Co.* v. *Callus*, 325 U.S. 578, 584.

This "makes it all the more necessary to how close to the line marked out by the specific facts of the cases before us" (Mr. Justice Frankfurter, dissenting, in U. S. Cartridge, p. 523).

13. The employee has the burden of establishing that he is covered by the Act (Warren-Bradshaw, p. 90; Schulte, p. 120; Mt. Clemens, p. 687).

14. Each case must stand on its own facts (Swift, p. 140; *Mitchell* v. *Brown*, supra, p. 362 of 224 F. 2d).[6]

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[6] It is nevertheless interesting to observe the specific results in only the Supreme Court cases and without listing the results in the very numerous lower federal court decisions including our own which have been decided to this date. Thus we have holdings, either direct or upon admission, that the Act does apply to employees of a loft building whose tenants are engaged in the production of goods for interstate commerce (Kirschbaum); the rate clerk of an interstate motor transportation company (Overnight Motors); employees of a rotary drill crew whose task ceased at an agreed depth short of the oil sand stratum (Warren-Bradshaw); employees of a paper wholesaler's branch houses from which distribution did not cross state lines (Jacksonville Paper); employees of a toll road and drawbridge over the intra-coastal waterway in Florida (Overstreet); employees of a construction company building new replacement abutments and repairing sub-structures of bridges damaged by floods and used by interstate railroads (Pedersen); night watchman for manufacturing plant shipping most of its goods in interstate commerce (Southern Package); underground iron ore miners (Tennessee Coal); citrus fruit cannery employees (Holly Hill); on-call time of fire guards for a packing plant producing goods for interstate commerce (Armour; Swift); warehouse and central office employees of an interstate retail chain store system (Phillips); interstate manufacturer's office building employees (Borden); employees of a manufacturer and interstate servicer of electrical equipment (Roland); employees of a window cleaning firm doing contract work for customers engaged in interstate commerce (Mich. Window Cleaning; but see Zachry, p.

In spite of the recent reference (Mr. Justice Douglas for the dissenters, in Zachry, p. 325) to the theretofore existing "symmetry of the judicial rulings under the Act", we must bear in mind that each of these cases, too, "must stand on its own facts", and that perhaps no decided case affords precise precedent for the ones now before us. It is our task to adopt a liberal approach where the statute is applicable and yet to be aware that there is an area of regulation which Congress has left to the states; to be mindful of the fact

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317); employees of a daily newspaper having less than one-half of 1% of outstate circulation (White Plains); employees of a service firm working on vehicles owned by a corporation engaged in interstate commerce (Boutell); employees of a loft building, the tenants of which deliver their manufactured goods to local distributors who ship them in interstate commerce (Schulte); employees of irrigation company supplying water to farmers who raise produce shipped in interstate commerce (Farmers Irrigation); employees of manufacturer operating government munitions plant under contract (U.S. Cartridge); off-the-road employees producing surfacing materials used on interstate roads and railroads (Alstate; Hempt); employees of an agency furnishing watchmen, fire inspection and other services to an interstate retail system (Joyce Agency); sugar processing plant employees (Waialua); employees of contractor building lock on new alternate route for intra-coastal waterway in Louisiana (Vollmer); non-professional employees of architectural and engineering firm designing projects in more than one state (Lublin). We also have holdings that the Act does not apply to employees of a wholesale produce company receiving some of its merchandise from other states but delivering only in Maine (Carr); a cook employed by a firm contracting to furnish meals to maintenance-of-way employees of an interstate railroad (Threlkeld); employees of a loft building, the tenants of which are not engaged in manufacture (10 East 40th St.); interstate railroad employees in training (Portland Terminal); employees engaged in the construction of a naval training camp and base depot (Murphey); employees of a construction company building a dam to increase a city's reservoir capacity (Zachry).

that construction employees may (Warren-Bradshaw; Pedersen; Alstate; Hempt; Vollmer; *Tobin* v. *Johnson*, supra, and *Tobin* v. *Pennington-Winter Const. Co.*, supra) or may not (Murphey; Zachry) be subject to the Act; and to be aware that the so-called new construction rule, which has been developed and applied in other areas of federal regulation,[7] does not now thwart coverage under this Act.[8] This may well involve the walking of a decisional tightrope but we do so with the comfort that all the cases are close and that the lines are necessarily finely drawn.

Zachry, being not only the most recent expression of the Supreme Court but involving, as it does, construction employees, deserves special mention. The employer there was constructing a Texas river dam designed to increase existing reservoir capacity of a water supply district which included the City of Corpus Christi. The dam was not a multi-purpose project. The existing dam was to continue in use until inundated upon the completion of the new construction. Nearly half the water consumption from the system went to industrial users most of whom produced goods for commerce. Some water was consumed by facilities and instrumentalities of commerce. The Court mentioned many of the general rules outlined above and noted three categories of activity to which the Act applied: first, employment which was

[7] See *Raymond* v. *Chi. Mil. & St. P. Ry. Co.*, 243 U.S. 43, and the cases cited by the dissent in *Vollmer*, p. 432-3.

[8] *Vollmer*, p. 429 and *Zachry*, p. 313. See *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 500; *Lublin*, p. 213; *Archer* v. *Brown & Root, Inc.*, 5 Cir., 241 F. 2d 663, 664-5, cert. den. 355 U.S. 825. The fact that construction is new, however, is not an irrelevant factor in determining coverage (*Zachry*, p. 319).

"in commerce" and the least affected by local interests; second, and a step removed, employment in "production for commerce"; and third, and furthest removed, employment in an activity which is only related to such production. It stated, pp. 313–4, 319 and 320 of 362 U.S.:

> * * * whether construction work is covered depends upon all the circumstances of the relation of the particular activity to "commerce" in the statutory sense and setting. * * *
>
> * * * As we held in *Vollmer*, that an activity is rightly called construction and is therefore distinct from operation, does not *per se* remove it from coverage. Construction may be sufficiently "closely related" to production to place it in that proximity to "commerce" which the Act demands as a predicate to coverage * * *
>
> * * * What is finally controlling in each case is the relationship of the employment to "commerce," in the sense of the statute, and it needs no argument that as to that relationship this case is significantly different from *Lublin* or *Vollmer*.

Zachry, of course, has distinguishing factual features from those before us, centers upon the "production" clause rather than the "in commerce" clause of the Act and, furthermore, is a decision by a bare majority of the Court. The case is helpful, however, because (a) it emphasizes the limitations of the statute; (b) it recognizes that all work and particularly all construction work is not covered by the Act; (c) it gives emphasis to the three gradations of covered activity; (d) it stresses the need for considered judgment in the light of all aspects of the activity under review, and (e) its implications are not restricted to the "production" clause.

The foregoing principles and *Zachry* itself show the way, we feel, to the disposition of the present cases and we affirm. We do so in the conviction, reached after a thorough review of this record and of the original exhibits, that the activities of these 29 employees are not within the vital phrases of the Act. We reach this conclusion in the light of the following factors:

A. The employees were certainly not engaged in the "production of goods for commerce" in spite of the allegations of the complaints and the argument evidently made in the trial court. The Secretary on this appeal does not seriously, if at all, urge coverage under this phrase of the statute. In any event, *Zachry* would appear to be conclusive opposing authority on that issue.

B. We are then concerned with fitting the work of these employees into the "in commerce" phrase. This is activity "least affected by local interests". Are these employees engaged in "trade, commerce, transportation, transmission or communication among the several States", as § 203(b) defines, and as *Zachry* outlines, p. 316, in "activities of traditionally national concern" at "the hub of national interest in 'commerce'" or does their work have a more ready relationship to what is essentially local activity?

C. Many of the decided cases, where coverage is found, involve the last phrase of the definition of "produced" (see footnote 3) which, *Zachry* tells us, pp. 316–7, is "at the periphery of coverage" and "marking the outer limits of applicability". The present cases with their reliance on "in commerce" involve the "more exacting" test.

D. Congress, when it wants clearly to include an area of activity, knows how to use appropriate lan-

guage (Holly Hill, p. 616; Polish Alliance, supra, p. 647 of 322 U.S.).

E. These employees were not engaged in the construction of the dam itself or in the clearance work at the damsite. Their activities were in more remote areas and certain phases of their work, such as complete clearance down to Elevation 840, admittedly were occasioned solely by the anticipated public recreational use.

F. The trial court's findings that the clearing operations "were strictly of a local nature", p. 560 of 179 F. Supp., has support in the testimony of defendant's witnesses and also finds support from the Secretary's principal witness, J. C. Pyle, Chief Hydraulic Engineer with the Corps. Much of the cross-examination of Pyle is set forth in Judge Miller's memorandum. Mr. Pyle did state on direct that in his opinion the clearing work was a part "of the overall construction" and he gave an affirmative answer to the question whether the clearing was "desirable from the standpoint of reducing floating debris on the reservoir"; yet he also acknowledged that the design memorandum stated that the clearing was desirable for reasons other than floatage and that "the largest reason for the clearing was to promote the passage of boats". On cross-examination, he recognized the change, since the Norfork dam was built, in official attitude as to the necessity of clearance and admitted that one of the plans studied provided only "for a very small amount of clearing" at the "access points and the main public access"; that floating material would not bother the penstocks at all; that "that type of clearing in the vicinity is desirable * * * I would be inclined to say that it is not necessary * * *"; that he didn't expect trouble; that "it was cleared to control mosquitoes and for boat passage, the boats being primarily recrea-

tional boats" and that "this is not a navigation project". The testimony as to the purpose of the clearing thus, at best, is in conflict. The trial judge's determination as to this is essentially factual in nature and we are reluctant and unable to say that it is clearly erroneous.

G. Setting to one side this conflicting testimony, the changes in the Corps thinking and other items reviewed in the trial court's opinion, there remains the significant nature of the clearing itself. This alone almost compels the conclusion that protection of the dam, if it were present as a factor at all, was no more than a consequential motive in the clearing. Only a little over 14% of the reservoir shoreline was cleared; the major portion of the timbered area in the reservoir had no clearing of any kind; in the modified clearing areas any existing fallen trees and trash were allowed to remain; there was no clearing in the flood-pool although water will rise to that level on occasion and at Bull Shoals flood-pool timber was killed by the flooding; complete clearing centered in the public access areas; and no clearing was done on opposite sides of the stream.

H. While we can accept the Secretary's proposition that the White River project must be viewed in its entirety, we are not convinced that it follows from this that every activity in connection with the project is covered by the Act. The argument would be stronger if Congress had used all its available constitutional power. Somewhere the line must be drawn. "There must be a cut-off point at some time * * *". *Mitchell* v. *Hygrade Water & Soda Company*, 8 Cir., 285 F. 2d 362, 367.

I. We are not here concerned with an issue comparable to that of the validity of government taking as to which the cases (including our own recent *United*

States v. *Mischke,* 8 Cir., 285 F. 2d 628, 631) hold that, at least in the absence of arbitrariness, wisdom of decision is a legislative matter not subject to judicial review. We have involved here the interpretation and application of a statute.

J. We attach little significance to the fact that the funds paid defendant came from general appropriations allocable either to flood control or power. Mr. Pyle testified that all the costs were allocated to these two categories.

K. The legislative tendency since the passage of the original Act has been in the direction of limiting the broad interpretations which the courts have given the statute. This is evidenced by both the Portal-to-Portal Pay Act, c. 52, 61 Stat. 84, now 29 USCA § 251 et seq., and the 1949 amendment to § 203(j). (See Steiner, pp. 253–6; Zachry, p. 317, and *Mitchell* v. *Hygrade Water & Soda Company,* supra, p. 366 of 285 F. 2d). We must heed that tendency and its judicial recognition.

The Secretary's alternative argument that, because one of the purposes of the clearing activities had a relationship to the passage of boats in the reservoir, and because the reservoir extends into two states, we are concerned with employment directed toward the improvement of navigability of a waterway of the United States and thus with employment plainly within the coverage of the Act, has its tantalizing aspects. We find no authority precisely supporting this contention. We think that the Secretary's argument is no more than part and parcel of, and not separate from, his main argument; that the fact there may be pleasure boats wandering into certain of the reservoir's tentacles stretching into adjacent Arkansas is only an incidental circumstance which does not make the present employees' activities of a kind the Act's

"engaged in commerce" language was meant to embrace; and that this secondary issue is fully controlled by all that has been said on the primary point.

Tobin v. *Pennington-Winter Const. Co.*, supra, which the Secretary urges upon us, must not be passed by. This is particularly so because the Supreme Court stated, p. 429 of 349 U.S., that certiorari in *Vollmer* was granted to resolve an apparent conflict with *Pennington-Winter*. This Tenth Circuit case involved clearance work for a multi-purpose project. The decision, one judge dissenting, placed great emphasis upon the comprehensive character of the improvement plan and upon the fact that the recreation facilities "were a very small part of the project", and it regarded as of "vital significance" the fact "that the major portion of the work" consisted of the removal of possible obstructions which would interfere with the operation of the dam itself. It is not clear whether "in commerce" or "production" was primarily involved. In any event, the record before us, in contrast, brings out the primarily local or recreation aspects of the work performed. Much of this may be due, as the record indicates, to the change in engineering attitudes in the intervening years, tempered by experience, as to the non-necessity of clearance in projects of this kind. Be that as it may, we feel that if *Pennington-Winter* falls on one side of the fine line which courts must draw, the present cases are sufficiently different from it so as to fall on the other side. In any event, *Pennington-Winter* predates *Zachry*.

We have reviewed, undoubtedly at too great length, the many Supreme Court cases, the rules they promulgate, and the several factors which have influenced us in reaching our conclusion. Decision in this kind of case is, after all, perhaps only a question of touch

and of tone. Although this may be one of the "hostile constructions" anticipated by the dissent in *Zachry*, p. 325, we conclude that the work performed by these employees was activity essentially collateral and local in nature and not subject to the reach of the Fair Labor Standards Act.

Affirmed.

United States Court of Appeals for the Eighth Circuit

No. 16509. September Term, 1960

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

WADE LAHAR CONSTRUCTION COMPANY, A CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in its Civil Cause No. 451 be, and it is hereby, affirmed.

APRIL 13, 1961.